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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-89596; File No. SR-CBOE-2020-078]

### **Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule to Adopt a new Fee Code Related to the Execution of an Equity Leg of a Stock-Option Order**

August 18, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on August 10, 2020, Cboe Exchange, Inc. (the “Exchange” or “Cboe Options”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### **I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change**

Cboe Exchange, Inc. (the “Exchange” or “Cboe”) is filing with the Securities and Exchange Commission (“Commission”) a proposal to amend its Fees Schedule to adopt a new fee code related to the execution of an equity leg of a stock-option order. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange’s website (<http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx>), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule to adopt a new fee code for the equity leg of a stock-option order, which orders would yield fee code "EP", effective August 10, 2020. The Exchange also proposes to amend the description of the existing fee for the equity leg of a stock-option order, which yields fee code "EQ" and the notes sections applicable to both fee codes EP and EQ noted in the fees schedule.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 options venues to which market participants may direct their order flow. Based on publicly available information, no single options exchange has more than 17% of the market share.<sup>3</sup> Thus, in such a low-concentrated and highly competitive market, no single options exchange possesses significant pricing power in the execution of option order flow. The

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<sup>3</sup> See Cboe Global Markets U.S. Options Market Volume Summary (August 7, 2020), available at [https://markets.cboe.com/us/options/market\\_statistics/](https://markets.cboe.com/us/options/market_statistics/).

Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue to reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain the Exchange's transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. In response to competitive pricing, the Exchange, like other options exchanges, offers rebates and assesses fees for certain order types executed on or routed through the Exchange.

Stock-option orders are complex instruments that constitute the purchase or sale of a stated number of units of an underlying stock or a security convertible into the underlying stock coupled with the purchase or sale of an option contract(s) on the opposite side of the market and execute in the same manner as complex orders. Through this functionality, the stock portions of stock-option strategy orders are electronically communicated by the Exchange to a designated broker-dealer (currently, Cowen is the only broker-dealer that may be designated for this service), who then manages the execution of such stock portions. In connection with the functionality, the Exchange adopted a stock handling fee of \$0.0010 per share for the processing and routing by the Exchange of the stock portion of stock-option strategy orders executed through those mechanisms.<sup>4</sup> The purpose of the stock handling fee is to cover the fees charges by the outside venue that prints the trade, as well as assist in covering the Exchange's costs in matching these stock-option orders against other stock option orders on the complex book. Additionally, the Exchange also largely passes through to Trading Permit Holders ("TPHs") the

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<sup>4</sup> See Securities Exchange Act Release No. 67383 (July 10, 2012), 77 FR 41841 (July 16, 2012) (SR-CBOE-2012-063) (stating the stock portions of stock-option strategy orders will be electronically communicated by the Exchange to a designated broker-dealer, who will then manage the execution of such stock portions).

fees assessed to the Exchange by the designated broker (i.e., Cowen) that manages the execution of these stock portions of stock-option strategy orders. The fee schedule also provides for a cap of \$50 per execution for orders yielding fee code EQ, which aligns with how the Exchange's only current designated broker-dealer (i.e., Cowen) applies a cap to the execution management of the stock portion of stock-option strategy orders.

Now, the Exchange proposes to amend its fee schedule to reflect the option of an additional designated broker-dealer, Penserra, to manage the execution of the stock portion of a stock-option strategy order. Specifically, the Exchange proposes to adopt fee code EP, which would be applicable to equity leg orders whose executions are managed by Penserra. Unlike Cowen, Penserra will not assess the Exchange fees for managing the stock-portion of a stock-option order, but rather will assess and bill its customers directly.<sup>5</sup> Therefore, the Exchange does not wish to assess the current stock handling fee which was adopted in part to recoup the fees assessed to the Exchange by the Exchange's current designated broker-dealer, Cowen. As such, the Exchange proposes to make clear that stock-portions of stock-option strategy orders managed by Penserra and yielding fee code EP will not be subject to a fee.

The Exchange next proposes to modify the current notes section of the Stock-Portion of Stock-Options Strategy Orders table. Particularly, the notes section currently provides that the Exchange shall assess a fee of \$0.0010 per share for the stock portion, which Cboe Options must route to an outside venue, of stock-option orders executed via the Complex Order Auction ("COA"), the Complex Order Book ("COB"), AIM, and SAM. The Exchange proposes to now clarify that this fee also applies to the stock-component of a QCC with Stock Orders. The

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<sup>5</sup> The Exchange notes it is possible Cowen directly charges fees to customers in addition to the stock handling fee the Exchange charges.

Exchange notes that it made it clear that such fee would apply to these orders when it adopted QCC with Stock Orders, but that it inadvertently did not update the corresponding fees schedule and intends to do so now to avoid potential confusion.<sup>6</sup> The Exchange lastly proposes to modify the description of existing fee code EQ to specify that it is applicable to equity leg orders whose executions are managed by Cowen.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act,<sup>7</sup> in general, and furthers the requirements of Section 6(b)(4),<sup>8</sup> in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers. The Exchange also believes that the proposed rule change is consistent with the objectives of Section 6(b)(5) requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and, particularly, is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that its proposed change to adopt fee code EP, which will assess no fee for stock portions of stock-option strategy order executions managed by Penserra, is

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<sup>6</sup> See also Securities Exchange Act Release No. 83891 (August 20, 2018) 83 FR 42949 (August 24, 2018) (SR-CBOE-2018-058).

<sup>7</sup> 15 U.S.C. 78f.

<sup>8</sup> 15 U.S.C. 78f(b)(4).

consistent with Section 6(b)(4) of the Act in that the proposal is reasonable, equitable and not unfairly discriminatory. Specifically, the Exchange believes the proposal is reasonable as market participants will not be subject to a fee for the execution of the stock-portion of a stock-option order handled by one of the Exchange's designated broker-dealers, Penserra. The Exchange believes it's appropriate to not assess a fee for orders managed by Penserra as compared to those managed by Cowen, as Penserra will directly charge its customers for the stock portion of stock-option strategy orders and not charge the Exchange, unlike Cowen who does not directly charge market participants, but rather charges the Exchange, which passes that fee through to customers. Further, the Exchange believes the proposal is equitable and not unfairly discriminatory because the proposed change applies to all TPHs and all TPHs that execute stock-option orders in the complex book will have the option to utilize Penserra to manage the execution of the stock portion of its stock-option strategy orders.

Additionally, the Exchange believes that the proposed description modification to existing fee code EQ will clarify that such executions yielding fee code EQ are managed by Cowen. The Exchange believes the amendment to the current notes section clarifies that the stock handling fee also applies to the stock-portion of QCC with Stock Orders, which reduces potential confusion and maintains clarity in the rules, thereby removing impediments to and perfecting the mechanism of a free and open market and a national market system, and, in general, protecting investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule change will impose any burden on competition

that is not necessary or appropriate in furtherance of the purposes of the Act. Specifically, the Exchange does not believe that the proposed change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed change will apply uniformly to the stock portions of all market participants' stock-option strategy orders that are handled by Penserra, a newly designated broker-dealer. The proposed rule change provides TPHs with additional options regarding the Exchange's handling of their stock-option orders.

The Exchange does not believe that the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market. TPHs have numerous alternative venues that they may participate on and direct their order flow, including 15 other options exchanges. Based on publicly available information, no single options exchange has more than 17% of the market share.<sup>9</sup> Therefore, no exchange possesses significant pricing power in the execution of option order flow. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and to attract order flow to the Exchange. Indeed, participants can readily choose to send their orders to other exchange, and, additionally off-exchange venues, if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its

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<sup>9</sup> See supra note 3.

broader forms that are most important to investors and listed companies.”<sup>10</sup> The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition v. Securities and Exchange Commission*, the D.C. Circuit stated as follows: “[n]o one disputes that competition for order flow is ‘fierce.’ ... As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’ ....”<sup>11</sup> Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>12</sup> and paragraph (f) of Rule 19b-4<sup>13</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the

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<sup>10</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

<sup>11</sup> *NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

<sup>12</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>13</sup> 17 CFR 240.19b-4(f).



Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2020-078 on the subject line.

##### Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-CBOE-2020-078. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m.

and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CBOE-2020-078 and should be submitted on or before **[INSERT DATE 21 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>14</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

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<sup>14</sup> 17 CFR 200.30-3(a)(12).